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Supreme Court, U.S.
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No. 93-603

In The

Supreme Court of the United States

October Term, 1993

GARY BEWLEY,

Petitioner,

v.

BRUCE HOWELL, SUPERINTENDENT; INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; JIMMY REEDER; DOUG DODD; JIM PAYNE; VERNON HOBBS; JUDY McINTYRE; WALTER HUSHBECK; individually and as members of the Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma; and CATHY RODGERS, an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Bruce Howell, Superintendent ("Howell"), Independent School District No. 1 of Tulsa County, Oklahoma (the "Tulsa School District"), Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma, and Jimmy Reeder, Doug Dodd, Jim Payne, Vernon Hobbs, Judy McIntyre and Walter Hushbeck, individually and as members of the Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma (the "Board members"), respectfully request that this Honorable Court deny the Petitioner's request for a writ of certiorari. Petitioner seeks review of a decision of the United States Court of Appeals for the Tenth Circuit that affirmed a summary judgment granted by the United States District Court for the Northern District of Oklahoma. The Court of Appeals properly followed the decisions of this Court in affirming the summary judgment order. As the Court of Appeals stated, under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, "[o]nce a properly supported motion for summary judgment is advanced, the nonmovant must come forward with affirmative evidence establishing the presence of a genuine issue of material fact." Petitioner's Appendix 1, p. 3. Because Petitioner failed to present any such affirmative evidence raising a dispute as to any genuine issue of material fact, Respondents were entitled to and were properly granted summary judgment.

This case does not present any important question of federal law, and the decision of the United States Court of Appeals for the Tenth Circuit is not in conflict with the controlling decisions of this Court, another court of

appeals, or a state court of last resort. Respondents respectfully ask that Petitioner's request for a writ of certiorari be denied.

OPINIONS BELOW

See Petitioner's Appendix 1 and Appendix 2.

JURISDICTIONAL STATEMENT

Respondents accept Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is replete with factual misstatements and unsubstantiated allegations. Petitioner's counsel in this matter is his sister, and that relationship perhaps accounts for the disregard of the record that is reflected in the Petition for Certiorari. Nevertheless, Respondents cannot and will not allow such misrepresentations to go unaddressed.

The opinions of the Court of Appeals and District Court, which are attached to the Petition for Certiorari at Appendix 1 and Appendix 2, establish the factual background for this action. Petitioner was terminated from an administrative position with Respondent Tulsa School District in June of 1990 following a thirteen (13) hour due

process hearing before the Board of Education. Petitioner's Appendix 2, p. 17. Prior to the hearing, Respondent Howell met with Petitioner to hear his side of the story concerning the allegations against him. Petitioner's Appendix 2, pp. 9-10. Respondent Howell later advised Petitioner in writing that he would recommend Petitioner's dismissal and that Petitioner had the right to a hearing before the Board of Education. Petitioner's Appendix 2, p. 10. Petitioner retained an attorney, and Petitioner and his attorney had over two months to prepare for the due process hearing. Petitioner's Appendix 2, p. 12.

Petitioner's due process hearing was held on June 20, 1990. Petitioner's Appendix 2, p. 13. The administration was represented by the Respondent Tulsa School District's regularly retained attorneys. Petitioner's Appendix 2, p. 10. The administration presented five witnesses, including Cathy Rodgers, who testified that she and Petitioner engaged in an act of sexual intercourse at Will Rogers High School during sixth hour on May 3, 1988. Petitioner's Appendix, pp. 13-14. Cathy Rodgers was a seventeen (17) year old student at Will Rogers High School at the time. Petitioner's Appendix 2, p. 7.

Petitioner was present with his attorney and had the opportunity to cross-examine Cathy Rodgers and all of the administration's witnesses. Petitioner's Appendix 2, p. 15. Petitioner then called twelve (12) witnesses in his defense and ultimately testified himself. Petitioner had the opportunity to tell the Respondent Board members everything he wanted to say in his defense. Petitioner's Appendix 2, pp. 15-17.

At the conclusion of the hearing, the Board of Education voted 5-1 to terminate Petitioner based on a finding that he had engaged in an act of sexual intercourse with a student under the age of eighteen (18). Petitioner's Appendix 2, p. 18.

Petitioner brought this action alleging numerous causes of action, including deprivation of property and liberty without due process, a first amendment "whistle blowing" claim, age discrimination, and various state law causes of action including breach of contract and violation of the Oklahoma Open Meeting Act. The District Court granted summary judgment to Respondents on all of Petitioner's claims. On appeal, Petitioner raised only three (3) issues: deprivation of liberty without due process, the first amendment whistle blowing claim, and qualified immunity. Petitioner's Appendix 1, p. 3. Because Petitioner did not preserve his state law claim of a violation of the Oklahoma Open Meeting Act before the Tenth Circuit Court of Appeals, he cannot raise that issue before this Court.[1] *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981). His allegations at pp. 4 and 7 of his Petition that state law was violated are insupportable and gratuitous.

Petitioner alleges at p. 5 that the Respondents failed to prove by a preponderance of evidence that he committed an act of sexual misconduct with the minor student

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[1] As the District Court pointed out, Petitioner did not even mention the alleged Open Meeting Act violation in his brief in response to the Respondents' motion for summary judgment. Petitioner's Appendix 2, p. 32. Petitioner has *never* presented any evidence to support this allegation.

Cathy Rodgers. Yet the record reflects that both parties characterized the due process hearing as a "swearing match" between Cathy Rodgers and Petitioner. Petitioner's Appendix 2, p. 29. The Respondent Board members heard both sides and believed Cathy Rodgers. Her testimony at Petitioner's due process hearing was ample evidence to support the decision to terminate Petitioner. See Petitioner's Appendix 2, pp. 13-14.

Petitioner asserts that he was "cleared" of this allegation in an investigation in 1988 and later denied access to that "investigatory file." Yet as the District Court observed, the evidence established that the initial decision of Petitioner's immediate supervisor not to pursue the investigation further in 1988 was "based upon an erroneous interpretation of alibi information." Petitioner's Appendix 2, p. 27. Moreover, both the District Court and the Court of Appeals concluded that Petitioner presented no evidence that Respondents had ever denied Petitioner access to any relevant document that he had requested. Petitioner's Appendix 1, p. 4; Petitioner's Appendix 2, pp. 19, 22.

Petitioner discusses his whistle blowing claim at pp. 5-6 of his Petition. He claims that he was terminated because he uncovered a plot to falsify student attendance figures at Will Rogers High School. Petitioner fails to mention that it is undisputed that the Respondent Board members, the decisionmakers who voted to terminate him, were never made aware of Petitioner's so-called whistle blowing. Petitioner's Appendix 1, p. 4; Petitioner's Appendix 2, pp. 21, 30. Furthermore, the undisputed facts establish that Petitioner himself never

mentioned this issue at his due process hearing. Petitioner's Appendix 2, pp. 17, 21. In addition, the District Court found that there was no evidence that the record keeping practices at Will Rogers High School, about which Petitioner purportedly complained, were in any way illegal. Petitioner's Appendix 2, p. 21. Thus, the record establishes that Petitioner "blew the whistle" on a perfectly lawful practice.

Petitioner asserts that Cathy Rodgers has a "lengthy psychiatric history" and has accused "many" men of having sexual relations with her. The record does not support either of these characterizations.[2] However, the salient point is that Petitioner brought both of these allegations to the attention of the Respondent Board members at Petitioner's due process hearing. Petitioner's Appendix, pp. 16, 23. To the extent that they had some bearing on Cathy Rodgers's credibility as a witness, these allegations were for consideration by the Board of Education.

Petitioner alleges that J. Douglas Mann, attorney for Respondents, met with the Board members prior to Petitioner's pretermination hearing and presented evidence that biased the Board against Petitioner. This is an absolute falsehood. There is no evidence anywhere in the

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[2] It is undisputed that another teacher at Will Rogers High School resigned after Cathy Rodgers identified him as the father of her child. Cathy Rodgers stated that she had been seduced by this teacher the year after she was seduced by Petitioner. Petitioner's Appendix 2, pp. 9-10. It is also undisputed that Cathy Rodgers admitted that she had sought counseling from a psychologist. Petitioner's Appendix 2, p. 23.

record to indicate that this occurred. The only evidence that even remotely bears on this point is the deposition testimony of Board member Vernon Hobbs. Hobbs recalled that at some time before the due process hearing, Respondent Howell (not Mann) advised the Board that the media would likely be contacting them regarding a minor student's allegations against Petitioner. According to Hobbs, Respondent Howell told the Board of Education that "he did not have enough information to do anything with at that time, but he was trying to get us notified before the media did . . . " (*see* Appellee's Answer Brief, p. 25, filed January 29, 1993, *Bewley v. Howell, et al.*, No. 92-5215 (10th Cir.), and citations to the record therein). The Court of Appeals, after a *de novo* review of the record, found no evidence of any other pre-hearing meeting. Petitioner's Appendix 1, pp. 5-6. The Court of Appeals found that this meeting was open to the public and that Petitioner had presented no evidence indicating that he was in any way prejudiced by this meeting. *Id.*

Petitioner's fabrications continue when he asserts that Mann, Cathy Rodgers, her mother, and her attorney, Doris Fransein, went into deliberative sessions with the Respondent Board members. This never happened, and Petitioner can point to no evidence in the record suggesting that it did. The District Court specifically noted in its opinion that the attorneys for the Respondents "did not meet with the Board while the Board deliberated or advise the Board in any improper manner." Petitioner's Appendix 2, pp. 28-29.

Petitioner asserts that the Respondent Board members indicated that they placed the burden of proof on

Petitioner to prove his innocence, rather than on the administration to prove the allegations against Petitioner. In fact, the record discloses that all of the Respondent Board members testified that they understood that the burden of proof was on the administration. Petitioner's Appendix 2, pp. 25, 29.

Petitioner contends that Respondents denied him access to the records in his office and had them "boxed up and destroyed" to keep Petitioner from being able to prove his whereabouts on the date and time in question. This is yet another falsehood. The Court of Appeals noted that there was no evidence in the record that the Respondents ever denied Petitioner a document he had properly requested or destroyed any relevant document. Petitioner's Appendix 1, p. 4. The District Court likewise found that no documents had been withheld from Petitioner. Petitioner's Appendix 2, pp. 22-24.

Petitioner states that after his due process hearing he found at his mother's house documents that proved he was breaking up a "girl fight" involving a gun during sixth hour on May 3, 1988. Yet the undisputed facts established that these documents did *not* reflect that anyone was in Petitioner's office during sixth hour on May 3, 1988. Petitioner's Appendix 2, p. 17. These documents do not contradict Cathy Rodgers's testimony in any way. Moreover, as the District Court found, the record shows that these documents were not withheld from Petitioner by Respondents. They were stored in Petitioner's mother's garage at all times. Petitioner's Appendix 2, p. 25. Yet Petitioner did not tell the Board of Education about these documents at his due process hearing. Petitioner's Appendix 2, p. 17.

During the course of this litigation, Petitioner has put forward allegations against Respondents ranging from failure to provide him the appropriate statutory termination procedures under Oklahoma law to discrimination based on age. Petitioner's Appendix 2, pp. 31-32. *None* of Petitioner's allegations has ever been supported by any evidence. Following Respondents' motion for summary judgment, it was incumbent upon Petitioner to present affirmative evidence establishing the presence of a genuine issue of material fact concerning any of these claims. As the opinions of the Court of Appeals and the District Court reflect, Petitioner failed to make such a showing.

SUMMARY OF REASONS FOR DENYING PETITIONER'S REQUEST

Petitioner's request for a writ of certiorari should be denied because this case does not present an important question of federal law. The lower courts properly followed this Court's decisions governing summary judgment practice, first amendment claims, and due process. All of the issues in this case are governed by existing law. Petitioner's request for a writ of certiorari does not raise any important new issues; it is merely an attempt to raise yet again the same baseless allegations that were considered and rejected by the Court of Appeals and the District Court.

Pursuant to Rule 56, FED. R. CIV. P., a party opposing a properly supported motion for summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that

there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The lower courts properly held Petitioner to this requirement and properly granted and affirmed summary judgment to Respondents when Petitioner failed to make such a showing.

The law governing Petitioner's first amendment claim is equally well established. Pursuant to *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), Petitioner had the burden of establishing both that his speech was protected *and* that it was a substantial or motivating factor in the action taken against him. Respondents conceded the first point, but Petitioner utterly failed to establish the second.

Finally, this Court has long held that due process requires that any deprivation of life, liberty, or property "be preceded by notice and an opportunity for a hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It is undisputed that Petitioner was terminated only *after* a thirteen (13) hour due process hearing, which in turn was preceded by two months of preparation and discovery by Petitioner and his attorney. Because the Court of Appeals and the District Court followed settled law in disposing of Petitioner's claims, Petitioner's request to invoke the discretion of this Court should be denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Court of Appeals and District Court Approved Summary Judgment in Favor of Respondents Pursuant to the Guidelines Established by this Court in *Celotex Corp. v. Catrett* and *Anderson v. Liberty Lobby, Inc.*

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court defined the standard by which a motion for summary judgment is to be judged:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322.

The Court observed:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. *Id.* at 323-24.

On the same day that *Celotex* was decided the Court also decided *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court held that the standard for deciding motions for summary judgment is the same as the standard for directed verdicts. *Id.* at 250. Thus, a properly supported motion for summary judgment should be granted unless there is sufficient evidence in

the record to justify a jury verdict for the non-moving party. As the Court in *Anderson* pointed out:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Id.* at 252.

The record of this case demonstrates that Petitioner failed to present evidence necessary to withstand Respondents' motion for summary judgment. The opinion of the District Court indicates that in his brief in opposition to Respondents' motion, Petitioner responded to only thirteen (13) of the fifty-nine (59) numbered statements of undisputed fact set forth in Respondents' opening brief. Petitioner's Appendix 2, pp. 4-5. Thus, Petitioner admitted[3] all but thirteen of the fifty-nine fact statements relied on by Respondents in seeking summary judgment.

The District Court, in a thorough opinion that meticulously cited to deposition testimony and the transcript of the due process hearing, discussed each of the undisputed material facts relied on by the Respondents and each of Petitioner's alleged statements of disputed fact.

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[3] Local Rule 15B of the Rules of the United States District Court for the Northern District of Oklahoma provides in part:

> A brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. . . . All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party. Petitioner's Appendix 2, p. 4.

Petitioner's Appendix 2, pp. 5-25. After a fact-by-fact comparison, the District Court concluded that there were no material facts in dispute. This conclusion was affirmed by the Court of Appeals following a *de novo* review of the record. Petitioner's Appendix 1, p. 3.

Petitioner contends that the District Court ignored its duty to view the facts in the light most favorable to him. Yet the opinion of the District Court noted:

> The evidence and inferences therefrom must be viewed in a light most favorable to the non-moving party. . . . Unless Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied . . . (citations omitted). Petitioner's Appendix 2, p. 3.

The Court of Appeals applied the same standard pursuant to its *de novo* review.

Characteristically, Petitioner is totally silent as to any specific fact dispute that the lower courts might have overlooked. He neither identifies nor makes reference to any such error anywhere in the record of this case.

Because the Court of Appeals and District Court correctly followed this Court's decisions regarding the showings necessary in ruling on a motion for summary judgment, and because Petitioner fails to identify any reason that this case merits review other than his own refusal to accept the judgment of the lower courts, Petitioner's petition for a writ of certiorari should be denied.

II. Petitioner Failed to Present Any Evidence that the Respondent Board Members Were Aware of Petitioner's Alleged Whistle Blowing.

The second and third propositions in the Petition for Certiorari relate to Petitioner's first amendment whistle blowing claim. Petitioner appears to argue that such claim is governed by state law. Yet he also characterizes this issue as a "federal question," and goes on to state his third proposition of error as follows: "The Tenth Circuit Court of Appeals has decided a federal question, the right of Petitioner to a jury trial on his state law claims for deprivation of his First Amendment right of free speech, for his termination for vocally refusing to alter attendance records, in a way in conflict with the decisions of the Supreme Court of Oklahoma." Petition for Certiorari, p. 14.

Respondents do not understand Petitioner's argument. The record, however, establishes that the Court of Appeals and District Court addressed Petitioner's first amendment claim. Following its *de novo* review of the record, the Court of Appeals concluded: "There is no evidence that . . . (4) the Board had been apprised of [Petitioner's] alleged 'whistle blowing' activities prior to the hearing." Petitioner's Appendix 1, p. 4. Likewise, the District Court noted:

> The evidence is undisputed that [Petitioner] did not communicate this allegation to the school Board previous to or during the hearing of June 20, 1990. *There is no evidence in the record that the school Board had any knowledge of [Petitioner's] prior "whistle blowing" concerning the average daily pupil attendance funding matter.* [Petitioner] bears

> the burden of showing that his speech was the motivating factor behind the Board's decision, and mere conjecture about the motive behind the official decision is not sufficient to carry the Plaintiff's burden (emphasis added). Petitioner's Appendix 2, p. 30.

Respondents would stress that Petitioner has never shown that there was any illegality or impropriety in the way attendance records were maintained at Will Rogers High School. The District Court concluded that there was "no significant law violation concerning Will Rogers High School's method and way of recording students attendance for funding purposes." Petitioner's Appendix 2, p. 21. Petitioner's speech on this issue did not reveal any wrongdoing by the Respondent Tulsa School District; at most, it disclosed Petitioner's own ignorance about public school enrollment and attendance practices in the State of Oklahoma. This point is discussed in detail in Appellee's Answer Brief, pp. 13-15, filed January 29, 1993, *Bewley v. Howell, et al.*, No. 92-5215 (10th Cir.).

The lower courts' decisions follow well-established law.[4] In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court set forth a three-pronged test to determine whether a public employee's first amendment right to free speech has been infringed: (1) the public employee has the burden of establishing as a matter of law that his speech was protected; (2) the employee must demonstrate that the protected speech was a substantial or motivating factor in the action taken

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[4] Contrary to Petitioner's suggestion, Oklahoma law does not control Petitioner's first amendment claims.

against him; and (3) the burden then shifts to the employer to show by a preponderance of the evidence that the employer would have made the same decision even in the absence of the protected speech. *Id.* at 284-287.

Respondents acknowledge that Petitioner's so-called "whistle blowing" is protected speech. But the record establishes that Petitioner failed to meet the *second* prong of the *Mt. Healthy* test, which requires a showing that his speech was a substantial or motivating factor in the Board's decision.

In *Prebble v. Brodrick*, 535 F.2d 605 (10th Cir. 1976), the Tenth Circuit noted that a first amendment claim is not an appropriate vehicle to attempt to overturn decisions made by school officials:

> It was incumbent upon the plaintiff to establish that his exercise of First Amendment rights was the reason for his discharge. . . . Prebble did present some substantial proof of his excellence as an economics professor and that he was a fine person to associate with. . . . But § 1983 is not a vehicle for federal court corrections of errors, committed by school administrators in the exercise of their discretion, not rising to the level of violations of specific constitutional guarantees (citations omitted). *Id.* at 617.

The court made clear that conjecture about the motive behind an official decision is not sufficient to carry the plaintiff's burden:

> Here Prebble's only proof touching on his First Amendment claim was that he had spoken out in some faculty meetings and associated with

> some faculty members who disagreed with their superiors, and with Dr. Pikl, who was replaced. But there was no showing that the defendants objected to this conduct. . . . [H]ere is it only surmise that his discharge was in retaliation for his statements or association (emphasis added). *Id.*

In *Vukadinovich v. Board of School Trustees*, 978 F.2d 403 (7th Cir. 1992), the Seventh Circuit affirmed the dismissal of a terminated teacher's complaint. The teacher was terminated after he had twice been arrested, convicted and incarcerated for alcohol and driving offenses. The teacher claimed, however, that his termination was motivated by his public criticism of the hiring of a new superintendent two years earlier. The Seventh Circuit observed that the teacher had been reemployed for another year after his speech. The court also noted that the teacher never raised his speech claim to the Board of Trustees at his due process hearing:

> Vukadinovich himself did not assert any link between his 1986 comments and his discharge more than two years later – despite repeated opportunities to do so – in fact, until he filed this lawsuit. During the hearing before the Board, Vukadinovich never suggested, or even hinted, that the Board might have been motivated by his 1986 comments. *Id.* at 408.

The court determined that no jury could conclude that the teacher's comments were a factor in the Board's decision to terminate him.

The Court of Appeals and District Court also reached the correct result based on the third prong of the *Mt. Healthy* test. The record shows that the Board terminated

Petitioner based on Cathy Rodgers's testimony that she and Petitioner engaged in an act of sexual intercourse at Will Rogers High School. Clearly, Petitioner would have been terminated regardless of his alleged whistle blowing. In a footnote in *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384 (10th Cir. 1988), the Tenth Circuit observed:

> We note that in general summary judgment is "an inadequate procedure for sorting out nebulous questions of motivation". . . . Nonetheless, there is ample evidence suggesting that the defendants had reasons for investigating Setliff unrelated to Setliff's speech. By contrast, Setliff's only evidence suggesting retaliation based on his speech are his conclusory allegations of retaliation and the recitation of certain criticisms he directed at certain Hospital practices. That is insufficient to withstand a motion for summary judgment. *See Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985) ("[A]lthough summary judgment is usually not proper in a case involving a weighing of conflicting questions of motive and intent, summary judgment is proper where the plaintiff presents no indication of motive and intent supportive of his position."). *Setliff*, 850 F.2d at 1393, n. 12.

In granting summary judgment to the defendants, the court in *Setliff* noted that the plaintiff had failed "to identify any evidence suggesting a causal link between Setliff's speech and the investigation." *Id.* at 1393. The court concluded by noting, "We require more than pure speculation to defeat a motion for summary judgment." *Id.*

These cases illustrate that the lower courts' decisions rejecting Petitioner's whistle blowing claim are well grounded in existing law.

Petitioner alleges that the Court of Appeals declined to take judicial notice as requested under Rule 201, FED. R. EVID. Petitioner misunderstands the nature of judicial notice under Rule 201, which is limited to "adjudicative facts." Petitioner argues that the Court of Appeals failed to take judicial notice of the law of Oklahoma. This rule, however, does not apply to judicial notice of *laws*, as the Advisory Committee Notes make clear. *See* 21 C. WRIGHT & K. GRAHAM FEDERAL PRACTICE AND PROCEDURE § 5103 (1977). Moreover, the disposition of Petitioner's first amendment claim by the lower courts makes the statutes of the state of Oklahoma regarding student attendance records irrelevant, because Petitioner utterly failed to carry his burden of showing that his speech on the student attendance issue was in any way a motivating factor in the Board's decision to terminate him. Petitioner's judicial notice argument is wholly without merit.

III. The Record Establishes that Petitioner Received All the Due Process Protections to Which He Was Entitled Under the Fourteenth Amendment.

Petitioner completely misunderstands due process analysis under the fourteenth amendment, as evidenced by his attempt to distinguish *Bishop v. Wood*, 426 U.S. 341 (1976). Indeed, Petitioner distorts the District Court's opinion when he suggests that the District Court relied on *Bishop v. Wood* in "granting . . . summary judgment to respondents on all issues." Petition for Certiorari, p. 15.

In truth, the District Court cited numerous authorities in addressing each of Petitioner's many causes of action. It relied on *Bishop v. Wood* only for the proposition that federal courts do not sit to second guess public bodies on the myriad personnel decisions made by such bodies from day to day. The District Court properly concluded that Petitioner could not use his due process claim to retry the *merits* of the decision to terminate him. Petitioner's Appendix 2, pp. 26-27.

Petitioner also fails to understand that the law does not absolutely protect property and liberty interests. The fourteenth amendment is no guarantee against the deprivation of property or liberty. It only insures that such deprivations will not be accomplished without due process of law. *Baker v. McCollum*, 443 U.S. 137, 145 (1979).

The record establishes that Petitioner was terminated following an all-day due process hearing before the Board of Education of Respondent Tulsa School District. Petitioner was represented by counsel, confronted with the evidence against him, allowed to present and cross-examine witnesses, and allowed to present whatever evidence and argument he wanted. Petitioner received more than adequate due process protection.

Petitioner complains that he has been stigmatized as a result of his termination. Yet to the extent Petitioner attempts to premise a liberty interest claim on the outcome of the Board hearing, *which Petitioner himself requested*, his claim is unfounded as a matter of law. In *Clark v. Mann*, 562 F.2d 1104 (8th Cir. 1977), the court discussed a non-tenured teacher's liberty interest claim as follows:

> [W]here derogatory reasons for nonrenewal are incorporated into a record made available to a prospective employer or are publicly announced, the teacher may be said to have been deprived of an interest in liberty. . . . It is important to note, however, that where the reasons for nonrenewal become public information solely by way of a public hearing held at the behest of the teacher, such disclosures cannot form the basis for a deprivation of the teacher's interest in liberty (citation omitted). *Id.* at 1116.

Thus, Petitioner cannot claim a deprivation of liberty without due process simply because stigmatizing information was made public as a result of his due process hearing.

Petitioner also contends that the Respondent Board members were biased against him. This claim was also considered and rejected by the Court of Appeals and the District Court. Petitioner's Appendix 1, p. 4; Petitioner's Appendix 2, p. 28. Petitioner can point to no evidence in the record that supports his allegation of bias. Absent such a showing, this claim must be rejected. In *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 497 (1976), this Court noted that the law presumes that school board members act with honesty and integrity when discharging their official duties. Because of this presumption, there must be "some substantial countervailing reason to conclude that a decisionmaker is actually biased." *Mangels v. Pena,* 789 F.2d 836, 838 (10th Cir. 1986). There is nothing in the record to indicate that the Board was biased. Contrary to Petitioner's apparent belief, the fact that the Board believed

the evidence against him and voted to terminate him is not evidence of bias.

CONCLUSION

For the reasons stated herein, Respondents pray that Petitioner's Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals be denied.

Respectfully submitted,

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